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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 31

LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF  
NEWARK, IN THE COUNTY OF ESSEX AND STATE  
OF NEW JERSEY, PETITIONER

v.

JOSEPH J. PINKUS, TRADING AS AMERICAN HEALTH  
AIDS COMPANY, ALSO KNOWN AS ENERGY FOOD  
CENTER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

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## REPLY MEMORANDUM FOR THE PETITIONER

Respondent's brief (pp. 18-23) raises a question as to whether the hearing examiner erred in excluding, both on cross examination and direct examination, certain textual materials offered by respondent. Since this question was not considered by the court below, it has not been discussed in petitioner's brief. In order to answer respondent's contentions this memorandum is respectfully submitted.

Respondent points out (Br. p. 18) that he "sought in every way he could think of to introduce into the Record in this case" certain extracts from medical dictionaries and journals (reproduced at R. I, 36-42), and that the hearing examiner erred in excluding references to these texts on cross-examination of petitioner's witnesses and direct examination of respondent's witnesses (Br. pp. 18-23). At least, respondent urges, "the textbooks and dictionaries \* \* \* unquestionably demonstrated the existence of medical opinion that kelp was effective in treating obesity" (Br. p. 22), and should have been admitted for that purpose. We submit that, if justification were necessary, the applicable rules of evidence would sustain the examiner's ruling. More significant, however, is the fact that the excerpts in question actually became a part of the "Record in this case" and, despite the examiner's ruling, were considered by the Post Office Department Solicitor who made the findings of fact and recommendation. It seems clear, therefore, that, assuming the examiner erred, his error was harmless. It seems equally clear from an examination of the materials in question that they lack the status as "authorities" which respondent attributes to them.

A. With the exception of Alabama (*Lambert v. State*, 234 Ala. 155), all jurisdictions apply the hearsay rule so as to forbid the use of books or treatises as independent evidence of the facts they

assert. *Davis v. United States*, 165 U. S. 373, 377; *United States v. One Device, Etc.*, 160 F. 2d 194 (C. A. 10); *Morten v. Equitable Life Ins. Co.*, 218 Iowa 846; *Peroce's Case*, 273 Mass. 429; Rogers, *Expert Testimony*, p. 284 (1941); Wigmore, *Evidence* § 1693 (3d ed. 1940). The hearing examiner cannot be said to have acted arbitrarily in following the overwhelming weight of authority which prohibits such procedure.

As respondent observes (Br. p. 13), there are sharp conflicts in the cases dealing with the question of when text authorities may be used in cross-examining expert witnesses. Thus, a number of courts prohibit the use of excerpts from texts where a witness has not relied upon those texts in his direct testimony (*Woelfle v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417 (C. A. 8); *State v. Blackburn*, 136 Iowa 743) and has only referred generally to "the authorities" (*Allen v. Boston Elevated Ry. Co.*, 212 Mass. 191; *Mitchell v. Leach*, 69 S. C. 413). Other courts permit such examination without a showing that the witness relied on the particular texts in question (*Hess v. Lowery*, 122 Ind. 225; *Ganz v.*

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<sup>1</sup> Respondent, citing *Borman v. Woods*, 1 Greene 441 (Iowa, 1848), couples Iowa with Alabama as a state departing from the general rule. But the later decisions in *Bisbey v. Railway and Bridge Co.*, 105 Iowa 293, *Etzkorn v. City of Oelwein*, 142 Iowa 107, and *Morton v. Equitable Life Ins. Co.*, *supra*, while not in terms overruling the *Woods* case, expressly reject the Alabama view (see 105 Iowa at 391) and make it clear that "it is error to admit medical works" (142 Iowa at 113-114) as independent evidence.

*Metropolitan St. Ry. Co.*, 220 S. W. 490 (Mo.)) or where it is shown that the witness relied to some degree on authorities in the field (*Rudd v. Hendrickson*, 176 Min. 138; *Laird v. Railroad*, 80 N. H. 377). In every case, however, since the reading of texts for whatever purpose is the use of hearsay, "the treatise-writer must, like every other witness, be shown beforehand to be properly *qualified* to make statements upon the subject in hand. This will require, as in other Hearsay exceptions \* \* \*, another witness who will testify to these qualifications,—which means here the summoning of anyone in the profession \* \* \* of the writer and ascertaining from him the writer's standing as an authority." Wigmore, *Evidence* § 1694 (3d ed. 1940).<sup>2</sup> See *Stoudemeyer v. Williamson*, 29 Ala. 558, 567; *Ganz v. Metropolitan St. Ry. Co.*, 220 S. W. 490, 496 (Mo.).

It seems sufficient in the case at bar, without considering the relative merits of the divergent rules indicated above, to point out that respond-

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<sup>2</sup> The same qualifications are found in the American Law Institute's *Model Code of Evidence* (1942), which respondent cites (Br. p. 23) as stating the "more liberal rule." Rule 529 of that Code provides that "a published treatise, periodical or pamphlet" (not dictionary) "on a subject of history, science, or art is admissible as tending to prove the truth of the matter stated therein if the judge takes judicial notice, or a witness expert on the subject testifies, that the *writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.*" [Emphasis added.]

ent, in his attempted cross-examination, nowhere showed that his so-called authorities were actually authoritative on the subject under consideration. In fact, one of the experts repeatedly pointed out to respondent's counsel that medical dictionaries and the single text (published in 1928 and which on the face of the excerpt quoted does not help respondent (R. 38)) upon which cross-examination was attempted were not reliable authorities upon which to determine whether kelp was an effective reducing agent (R. II, 100, 103, 105, 110). As is suggested more fully below, this rejection of the dictionaries upon which respondent primarily relies as authoritative medical treatises would appear to have been wholly proper. In any event, respondent's failure to support these works as authoritative warranted their exclusion. Given this circumstance, plus the fact that there is considerable judicial authority for disallowing the type of cross-examination in question even where the texts are "qualified", there would seem to be no merit in respondent's contention that the hearing examiner's rulings were such an abuse of discretion as to require remand of this case. Cf. *Davis v. United States*, 165 U. S. 373, 377; *Woelfle v. Conn. Mut. Life Ins. Co.*, 103 F. 2d 417, 420 (C. A. 8). These cases indicate that "Whatever the correct rule may be, it is apparent that the scope of such cross-examination must necessarily be left largely to the good common sense and

sound judgment of the trial court, whose rulings should be upheld unless they constitute a clear abuse of sound judicial discretion." *Ibid.*

B. Even assuming, however, that the hearing examiner erred in excluding the textual materials, respondent can show no prejudice resulting from this error. For the materials excluded at the hearing were made a part of the brief submitted by respondent to the Solicitor of the Post Office Department (R. I, 25). And it was the Solicitor, not the hearing examiner, who made the finding of fact and recommendation for issuance of the fraud order. In his Memorandum, the Solicitor expressly stated that he had carefully considered the "entire record, including all documents and exhibits and the brief filed on behalf of the respondent" (R. 149). Later in his Memorandum (R. 25-26), addressing himself squarely to the text materials, the Solicitor ruled that "if they were considered as evidence in this case they could only establish what was conceded on cross-examination by one of the expert medical witnesses for the Government, namely, that he has seen statements in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to have some value in the treatment thereof." Since the materials were in fact treated as if in evidence, respondent cannot complain of their exclusion.

C. An examination of the materials referred to by respondent (R. I, 36-42) demonstrates their

insufficiency to establish the existence of reliable medical opinion holding kelp an effective treatment for obesity. Most of these books are medical dictionaries or drug catalogues. As was pointed out by the Senior Medical Officer of the Food and Drug Administration when confronted with some of these dictionaries on cross-examination, such compilations are "certainly not" reliable sources for medical research (R. II, 100). A medical dictionary, the same witness stated later in his testimony, "is not a standard work \* \* \* which anybody would go to for the reference as to what certain drugs would do." (R. II, 103). He further stated that the Dr. Dorland's dictionary, referred to in Respondent's brief (p. 6), was not "a reliable authority for the action of drugs. No, it certainly is not." (R. 103).

We quote in the note below additional excerpts from the testimony on this point, which appears in the Record at R. II, 100-114.

**R. II, 100:**

**Q. Is Steadman's Medical Dictionary considered a scientific treatise?**

**A.** Not as a scientific treatise for the basis of what certain things will do. It is a rather compendium stating what certain drugs have been used for or that certain drugs have been reputed to have certain value, and so forth. It certainly is not an authority for what drugs are actually, in the modern consensus, shown to do.

**Q. You say it is a compendium of medical thought, is it?**

**A.** It is a compendium of reliable and unreliable medical thought. So it will have to be taken with considerable consideration as to that.

These statements merely corroborate what every student of a science or practitioner in a learned profession presumably knows. A lawyer

Q. Is Steadman's considered reliable?

A. Reliable for what?

Q. Reliable in his research.

A. I wouldn't go to it to find out what a drug would do.

Q. I just want you to answer my question.

A. Reliable for research?

Q. Yes, sir.

A. Certainly not.

\* \* \* \* \*

R. II, 103:

Q. Doctor, what is the reputation of Dorland's "The American Illustrated Medical Dictionary", 1944 edition?

A. I stated that is not a standard work by which anybody would go to for the reference as to what certain drugs would do. You might go to it to see what certain drugs have done or what they have been reputed to have done, but there are no statements made in these dictionaries—for instance, I know of one here a few years ago was carrying the statements to the effect that certain drugs like sarsaparilla, certain plant drugs had value in syphilis. They used to think that thirty or forty years ago before they knew what syphilis was due to, but you can't rely on statements in dictionaries as to what the real effects of drugs are—

Q. You wouldn't rely on such dictionaries—

A. — or drug catalogs.

\* \* \* \* \*

R. II, 104-5:

The WITNESS. I have seen statements in dictionaries to indicate seaweed has been used as a treatment, or reputed to have some value in the treatment of obesity, yes.

By Mr. FAST:

Q. Have you any basis for stating that that statement is untrue?

A. Certainly, I have. I've—

Q. Well, what is your basis for—

A. — my whole testimony already given is—

would scarcely consider a law dictionary a sufficient authority for a statement of the law,

**Q.** — well, I'm trying to find out what your authority for your statement is.

**A.** Way back 35 years ago in 1910, somebody reported that iodine had some value, but since then other people have made tests and have tried the preparations and the same books that once said that iodine might be good for obesity are now saying it has been reputed to be or formerly used or was contained in nostrums sold for obesity, and so forth. But certainly no reputable textbook that I know of dealing with the treatment of obesity and effects of drugs thereon—textbooks that are used as authorities for such statements—I don't know of any of them that say that iodine is effective, or seaweed or any of the minerals or any of the other ingredients in seaweeds have any value for reducing.

**Q.** Doctor, I asked you did you consider the 1944 edition of "The American Illustrated Medical Dictionary" endorsed by Dr. Dorland as reliable?

**A.** Not as a reliable authority for the action of drugs. No, it certainly is not.

\* \* \* \* \*

R. II, 109-110:

**A.** I said that in my examination of textbooks which I consider the authorities or the place to go for an authority on obesity and the effects of drugs on obesity, the books of internal medicine, in articles published along those lines, as being the places to go for authority as to the consensus of opinion, and also to modern pharmacologists dealing with the action of drugs. I have consulted those and I think I know what the modern opinion is and I've found in none of those any opinion which would lead me to believe that seaweed in this dosage has any value whatever in the treatment of obesity for any purpose.

**Q.** Now, Doctor, will you be good enough to give us the authorities that you used in coming to that conclusion?

**A.** I stated that I had looked in all the textbooks of internal medicine dealing with the question of obesity and all the modern pharmacologists.

particularly when every authoritative text said the contrary. It would appear to be at least as inappropriate, and potentially far more dangerous, for a physician to employ a medical dictionary to determine the efficacy of drugs. For a dictionary, exhausting the alphabet in its definitions, can scarcely be deemed an independent source of inductive knowledge or a reliably contemporary compendium of other sources. The same would appear to be true of the drug catalogues from which respondent quotes.

It should be noted that the quotations respondent adduces from dictionaries and catalogues, apart from their inadequate character as authority, scarcely give the impression that any significant body of contemporary medical opinion regards kelp as an effective treatment for obesity. Two of the six state that kelp was "formerly used in \* \* \* obesity \* \* \* on account of iodine content" (R. 37), and that "it is doubtful whether its preparations are capable of reducing human obesity unless given in such doses as to interfere with digestion and injure the health" (R. 37). One dictionary states merely that fucus "has been employed in the treatment of obesity" (R. 36), a phrase which implies that it is no longer so employed. A fourth compendium quoted at length by respondent (R. 38-39) contains nothing to indicate the use of fucus. Only two of the dictionaries continue to use the present tense in their statements that fucus "is used

\* \* \* as a cure for obesity" (Dorland's) (R. 36) and that fucus "is used \* \* \* in obesity" (Gould's) (R. 38).

The other materials presented by respondent scarcely bolster his case. From *Pharmacotherapy, Materia Medica & Drug Action* (1928) (R. I, 38), respondent quotes the statement that fucus "was at one time \* \* \* given as an antifat remedy." (Emphasis added.) *The Journal of Pharmacology and Experimental Therapeutics* (1910) (R. I, 39-42), apart from stating that experiments conducted forty years ago showed increased thyroid activity in rats and guinea pigs after they were fed bladderwrack, would appear to be irrelevant to respondent's case. Nor is an article published in 1875 (*Dublin Journal of Medical Science*, R. I, 42), reporting weight losses from fucus, a persuasive substitute for competent medical testimony some seventy years later.

In view of the evidence of the Government's medical expert that no modern scientific medical textbook or other authority recommends kelp as a treatment for obesity (R. 26, R. II, 103, 105, 109), the evidence as a whole fully supports the Solicitor's finding, quoted above, that the material proffered by respondent shows merely that "kelp was at one time used \* \* \* or reputed to have some value" in the treatment of obesity.

D. Respondent also sought to introduce the above material by asking his medical witness in

advance whether he agreed with what was stated in the books, and then reading the excerpts into the record (R. II, 171-3, 175, 181, 182). This effort to place in evidence the opinions of the authors of the books, as distinct from the opinion of the witness, was rejected on the basis of the statement in *Jones on Evidence, Civil Cases* (3d ed., 1924) that "it has been held inadmissible for such a witness to read to the jury from books although he concurs in the views expressed, or to even state the contents of such books though he may refer to them to refresh his memory" (R. 172). To the same effect, see *Thompson v. Amnios*, 160 Ga. 886; *Commonwealth v. Sturtevant*, 117 Mass. 122; *St. Louis, A. & T. Ry. Co. v. Jones*, 14 S. W. 309 (Tex.); *Boyle v. State*, 57 Wis. 472. Rogers, *Expert Testimony* pp. 286-287 (1941). It would have been perfectly proper, of course, for respondent to have permitted the witness to refresh his recollection from the books and then to state his personal views. Inasmuch as respondent made no effort, after the excerpts from the dictionaries were excluded, to ask the witness to state the substance of the views with which he purportedly agreed, it is clear that he was merely trying to get the excerpts from the

books into the record as independent evidence, contrary to the established rule.

Respectfully submitted,

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OCTOBER 1949.